

LAW OFFICES  
**KOTEEN & NAFTALIN**  
1150 CONNECTICUT AVENUE  
WASHINGTON, D.C. 20036

BERNARD KOTEEN  
ALAN Y. NAFTALIN  
RAINER K. KRAUS  
ARTHUR B. GOODKIND  
GEORGE Y. WHEELER  
HERBERT D. MILLER, JR.  
MARGOT SMILEY HUMPHREY  
PETER M. CONNOLLY  
M. ANNE SWANSON  
CHARLES R. NAFTALIN  
GREGORY C. STAPLE  
MORTON J. POSNER

TELEPHONE  
(202) 467-5700  
TELECOPY  
(202) 467-5915

February 17, 1995

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: RM-8577

Dear Mr. Caton:

Herewith transmitted, on behalf of United States Cellular Corporation, are an original and four copies of its Comments in the above-referenced rulemaking proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

  
Peter M. Connolly

Enclosures

RECEIVED

FEB 17 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

No. of Copies rec'd 024  
List ABCDE

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

ORIGINAL

In the Matter of )  
 )  
Amendment of the Commission's ) RM - 8577  
Rule To Preempt State and )  
Local Regulation of Tower )  
Siting For Commercial )  
Mobile Services Providers )

RECEIVED  
FEB 1 1985  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

COMMENTS

DOCKET FILE COPY ORIGINAL

Introduction

United States Cellular Corporation ("USCC") hereby files its Comments in support of the Petition For Rulemaking filed by the Cellular Telephone Industry Association ("CTIA") in the above-captioned proceeding.

USCC is a Delaware corporation and is a majority owned subsidiary of Telephone and Data Systems, Inc. ("TDS"). USCC is the parent company of 34 MSA and 111 RSA licensees. Currently, USCC serves approximately 447,000 customers and 50,000 roamers a day in its various markets. Thus, USCC has an obvious stake in the establishment of a reasonable federal policy concerning the construction of base station facilities by cellular, paging and PCS licensees.

I. The FCC Should Adopt The Strongest  
Possible Pre-Emption of Obstructive  
Local Zoning Requirements

CTIA's Petition makes a strong case that Section 332 of the Communications Act furnishes an adequate basis for the FCC to act concerning local zoning restrictions on Commercial Mobile Radio

Service licensees. USCC concurs in and will not repeat that analysis here.

We would emphasize however, that an essential congressional purpose in enacting the 1993 amendments to the Communications Act was to "encourage competition and provide [telecommunications] services to the largest feasible number of users."<sup>1</sup> And the FCC's actions since the enactment of the 1993 amendments, in creating the Wireless Bureau in rewriting its rules to ensure "regulatory parity" among wireless providers and in proceeding to license PCS systems, have sought to fulfill that purpose. The actions of Congress and the FCC reflect, in turn, a national consensus concerning the benefits of expanded telecommunications services through increased competition.

However, despite that consensus, there is now a real and growing danger that the benefits of the wireless revolution will never reach millions of Americans. That danger has only one significant source, namely the local zoning process. Many local communities have begun to use their zoning authority in an unreasonable way, by placing insupportable restrictions on the siting of cellular towers or by simply refusing to allow such towers into their communities. And, local opposition to radio towers is intensifying at precisely the time when thousands more towers will have to be licensed to accommodate new and expanded wireless services.

---

<sup>1</sup> See 47 U.S.C. Section 332(a)(2), (a)(3).

In the main, USCC has still been able to provide good service to its markets, even where it has not been able to build towers in certain locations and where it has only been able to build towers in other locations after considerable delay and expense. However, as the number of cells increases nationwide, the process has grown more and more difficult. And with the advent of PCS, with its smaller service areas, the consequences, for example, of one community refusing to allow towers will not be able that a tower is located in a neighboring community and service is still provided but that that community and those who travel in it will not receive service.

Accordingly, USCC believes that the Commission must act soon on this issue. CTIA's analysis of Section 332 and its citation of prior FCC pre-emption orders provides strong support for the Commission's right to take necessary action and USCC urges that the FCC act up to the limits of what it determines to be its authority.

As noted above, USCC does not consider it useful to recapitulate the legal analysis ably provided by CTIA. Rather, USCC wishes to help demonstrate the urgency of FCC action by describing briefly some of its specific zoning difficulties. Each numbered paragraph below will give one of USCC's proposed cell site locations, the FCC defined cellular market, and the year or years in which the zoning controversy took place, and will furnish a brief description of the nature and outcome of the zoning controversy. The list is intended to be typical rather than exhaustive. But it should, we believe, give the FCC some sense of

what USCC and other licensees attempting to serve the public interest by providing cellular service are now up against in many communities.

1. 1994 - Clear Lake, Iowa (Iowa RSA #14 - Kossuth)

The Cerro Gordo County Zoning Board of Adjustment denied a permit for a USCC tower because they believed that the State of Iowa was incorrect in designating cellular licensees as public utilities because cellular rates are not regulated. An additional reason given for denying the permit was the Board's belief that the tower would be a hazard to aircraft. The Board disregarded the FAA Determination of No Hazard for the proposed site.

2. 1993 - Mount Vernon, Iowa (Cedar Rapids MSA)

Linn County allowed USCC to erect a tower at Mount Vernon, but required USCC at a cost of \$35,000 to provide multiple mounting locations on the tower for possible future users in order to reduce the number of towers in the county. Subsequently the county erected its own tower for public safety uses nearby and did not use USCC's tower. The multiple mounting locations on USCC's tower remain vacant.

3. 1992 to the present - Gaylord, Michigan (Michigan RSA #4 - Cheboygan)

The FCC approved the cell site on September 25, 1992. However, USCC has not been able to construct owing to a refusal to approve the tower by the Sego County Board of

Zoning Appeals. The Sego County Circuit Court in 1994 held that Zoning Board had not made a decision based on findings of fact and remanded the case to the Zoning Board. USCC is now seeking a ruling in court which will require the Zoning Board to reverse its earlier ruling. Case pending.

4. 1994 - Morganfield, Kentucky (Kentucky RSA #2 - Union)

Although all necessary Kentucky PSC and Union County approvals had been obtained, the tower could not be erected, according to the county, because of "subdivision restrictive covenants."

5. 1994 to the present - Hollis, New Hampshire (Manchester NECMA)

USCC applied for a permit to build a 180 foot tower and appurtenances. After several meetings, the town approved the tower, but the permit specifically did not permit microwave dishes. USCC filed suit in New Hampshire state court. The suit was settled by the town agreeing to "re-hear" the application, including the microwave dishes. However, the application has been transferred to a regional zoning board. Case pending.

6. 1994 - Milford, New Hampshire (Manchester NECMA)

USCC applied to build a 100 foot tower. The town denied the application on the grounds that no new telecommunication facilities will be permitted in the town.

7. 1993 -- Pine Grove, Pennsylvania (Pennsylvania RSA #8 - Union)

USCC applied for a 300 foot tower with township support. The Schuylkill County Planning Board denied the application on the grounds that cellular licensees are not public utilities, that the tower would be a building and that it would "injure" the neighbors. USCC then sued the town in state court, which overturned county board's findings. USCC then, for other reasons, did not construct the tower.

8. 1992-93 - Hallowell, Maine (Maine RSA #3 - Kennebec)

USCC applied to construct a 180 foot tower, which USCC believed complied with the local zoning ordinance. The zoning process involved three months of hearings, which ended with the permit being denied on the grounds that the tower might interfere with cable television reception, might result in a "visual impact" on nearby houses and might cause a reduction in property values. USCC pointed out, to no avail, that there already were ten telecommunications towers within 500 feet of the proposed tower.

9. 1992-93 - Manchester, Maine (Maine RSA #3 - Kennebec)

USCC sought town permission to build a 180 foot tower in the same area as other existing towers. After eleven months of discussions with the town concerning tower lighting, property values, RF interference and possible health effects, USCC received approval for a 150 foot tower.

10. 1989-1994 - Turner, Maine (Lewiston NECMA)

USCC applied for permission to build a 300 foot tower. A summer home owner organized local opposition. USCC was required to provide a detailed explanation of possible RF interference and describe the possible "visual impact" of the tower. USCC received approval to build a 200 foot tower after six months of hearings and extensive submissions. Two years later, USCC, after three more months of hearings, finally received approval to build its 300 foot tower and did so.

11. 1994 - Pawling, New York (Poughkeepsie MSA)

USCC applied for permission to build a 180 foot tower. The town asked USCC to withdraw its application and lease space on a previously approved tower and then apply to add a building and antennas. After six months, USCC received approval for the alternate facilities.

12. 1989-90 - Beekman, New York (Poughkeepsie MSA)

USCC applied to build a 180 foot tower adjacent to an existing 150 foot tower. All site plans and subdivisions plans were submitted on time in accordance with the town's requests. But USCC received its permit only after nine months and sixteen meetings with the town.



13. 1994 - Micanopy, Florida (Gainesville MSA)

In 1994, USCC sought approval from the Alachua County Commission for a tower at Micanopy, Florida. Despite support from the county planning staff, the Commissioners disapproved the tower after two residents opposed it, citing radiation fears and a belief that the tower would cause a visual impact on a rural area. USCC had presented extensive evidence disproving radiation fears and describing the steps taken to minimize the visual impact, which was disregarded by the Commissioner. USCC did not appeal because the land owner then withdrew his consent to build on the site.

14. 1994 - to the present - Northwest Gainesville  
(Gainesville MSA)

In 1994, USCC also proposed this site to the Alachua County Commission. It too was supported by the county planning staff and was denied after only one nearby resident voiced opposition, on the grounds that a tower might threaten his ability to establish a "horse park." Among the reasons cited by commissioners for denying the permit were beliefs that there were "too many towers" in the county already, and that cellular companies had "enough towers," and radiation fears. One commissioner expressed the belief that cellular systems should only have one tower, like the local television station. USCC has appealed this determination and has prevailed at the first level of judicial review. The county has now appealed to the next appellate court, where the case is pending.

15. 1994 - to the present - Bronson, Florida (Florida  
RSA #6 - Dixie)

USCC sought consent from the Levy County Commission to construct a tower near Bronson, Florida. The Commission denied the request because the proposed site might some day become residential in character and because the commissioners believed that one cellular carrier was sufficient for the county. USCC appealed to the state courts and has prevailed. USCC is, however, still negotiating with the county concerning the proposed tower.

Conclusion

We would propose the following guidelines for the FCC to apply in developing rules in this proceeding. Cellular and other CMRS licensees should be treated as the providers of an important national public service. Local communities should not be free to ban CMRS towers altogether, or to discriminate between different types of FCC licensees in tower siting determinations. Localities should not be granted authority to have their own RF radiation standards or to obtain excessive "in kind" or monetary concessions from CMRS licensees seeking to provide service.

Zoning restrictions, if any are to be permitted, should be strictly limited to legitimate local concerns involving the proper placement of telecommunications towers, in accordance with customary distinctions between business and residential zoning uses. CMRS licensees should be entitled to receive the same treatment from local communities as would any other legitimate business seeking the right to operate in a given locality.

USCC applauds the FCC for opening this proceeding. There is nothing more urgent to the achievement of a national wireless network than preventing local zoning determinations from undermining that objective.

Respectfully submitted,

**UNITED STATES CELLULAR CORPORATION**

By: Alan Naftalin By PC  
Alan Y. Naftalin

Peter M. Connolly  
Peter M. Connolly

Koteen & Naftalin  
1150 Connecticut Ave., N.W.  
Washington, D.C. 20036  
(202) 467-5700

February 17, 1995

Its Attorneys